

Hoffman Homes, Inc. v. Administrator, U.S. EPA:

The Seventh Circuit Gets Bogged Down in Wetlands

Wetlands play a vital role in preserving water quality and the aquatic ecosystem,¹ yet across the contiguous forty-eight states they are fast disappearing.² Under section 404 of the Clean Water Act (CWA),³ the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) exercise joint authority over the dredging and filling of "waters of the United States." The Corps issues permits for dredging activities and the EPA retains a veto power over the Corps.⁴ In 1985, the Supreme Court upheld the

¹ Mary K. McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 694-97 (1989); see also *infra* text accompanying notes 12-15.

² Estimates of the destruction of wetlands range from 30% to 50% of the original total in the contiguous 48 states. About 90 million acres of wetlands remain in that area. McCurdy, *supra* note 1, at 697-99. The annual destruction of wetlands is estimated at 458,000 acres. Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307, 307 (1988); see also Edward V.A. Kussy, *Wetland and Floodplain Protection and the Federal-Aid Highway Program*, 13 ENVTL. L. 161, 168 (1982) (quoting President Carter's estimate that 40 percent of the 120 million acres of wetlands catalogued in the 1950s had been destroyed by 1977).

³ 33 U.S.C. §§ 1251-1376 (1988). Section 404 is codified at 33 U.S.C. § 1344 (1988).

⁴ 33 U.S.C. §§ 1311, 1344 (1988). The sections state, in part, the following:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and section[] . . . [404 of this Act,] the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311 (1988).

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites

. . . .

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator [of the EPA] is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification . . . as a disposal site, whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning

Corps' inclusion of adjacent wetlands—those which border interstate waters—as part of the “waters of the United States.”⁵ The Court, however, specifically declined to decide whether the CWA grants federal jurisdiction over intrastate wetlands.⁶

and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary.

....

(d) “Secretary” defined

The term “Secretary” as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

33 U.S.C. § 1344(a)-(d) (1988).

“Pollutant” is defined as “dredged spoil, solid waste, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6) (1988).

For a further explanation of the dual permitting jurisdiction of the Corps and the EPA under § 404, see *Hoffman Homes, Inc. v. Administrator, United States EPA*, 961 F.2d 1310, 1312 n.2, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983) *later proceeding*, 786 F.2d 631 (5th Cir. 1986); *In the Matter of Alameda County Assessor's Parcel Nos. 537-801-2-4 & 537-850-9*, 672 F. Supp. 1278, 1285-86 (N.D. Cal. 1987); *see also* Kussy, *supra* note 2, at 200-01; Joseph A. Hedall, Significant Developments, *The Clean Water Act—More Section 404: The Supreme Court Gets Its Feet Wet*, 65 B.U. L. REV. 995, 1007 (1985).

⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

⁶ *Riverside*, 474 U.S. at 131 n.8 (“We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.”).

The Court affirmed the Corps' jurisdiction over adjacent wetlands by finding the Corps' inclusion of adjacent wetlands as part of the “waters of the United States” to be a reasonable interpretation of the CWA. *Id.* at 135, 139. In so doing, however, the Court did not determine the precise extent of jurisdiction provided by the CWA. *See* Guy V. Manning, Comment, *The Extent of Groundwater Jurisdiction Under the Clean Water Act After Riverside Bayview Homes*, 47 LA. L. REV. 859 (1987). Accordingly, it has been suggested that:

The greatest weakness of the decision is that it missed a chance to decide the law respecting waters of the United States. Had the Court interpreted Congress' intent as to the extent of such waters under the statute, it would never have reached the issue of reasonableness of the Corps' regulations; they would have been either too broad, or not broad enough, in light of the Congressional mandate. The Corps and the EPA would

Federal jurisdiction over intrastate wetlands is vital if their destruction is to be slowed. Without federal oversight, the development of many wetlands goes unregulated, leaving them to be filled or drained with no attempt at mitigation.⁷ During the 1977 debate over the CWA, one representative lamented the potential absence of federal jurisdiction, noting that “[t]he States have shown a remarkable penchant toward development of these valuable and irreplaceable wildlife resources.”⁸

The Seventh Circuit, in three decisions on the same case—*Hoffman Homes, Inc. v. Administrator, U.S. EPA*—first rejected CWA jurisdiction over intrastate wetlands,⁹ then vacated its opinion,¹⁰ and finally upheld CWA jurisdiction, but not for the specific intrastate wetland at issue.¹¹ This Comment, using the vacated decision of *Hoffman Homes I* to frame the

not be free to establish their own versions of the law as they see fit, and considerable controversy as to the extent of the CWA would have been resolved.

Id. at 867.

⁷ See Jackson, *supra* note 2, at 327–33 (detailing the destruction of wetlands in Texas, California, Washington and South Carolina because of the Corps’ failure to exercise jurisdiction and to require a permit application before filling or draining the wetlands).

Individual states may apply to the U.S. EPA to enforce their own permit program for activities affecting certain waters within their borders. 33 U.S.C. § 1344 (g)–(l) (1988). The state program must include criteria nearly identical to the federal guidelines in § 404. 123 CONG. REC. 38,973 (1977), reprinted in 3 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 419 (1978) [hereinafter 3 LEGISLATIVE HISTORY]. “In the past, one of the greatest concerns of allowing the States to assume the 404 program was that they would not be able to implement the program due to a lack of funds.” *Id.* (statement of Rep. Harsha).

⁸ 123 CONG. REC. 38,996 (1977), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 7, at 417–18 (statement of Rep. Dingell). Representative Dingell stated that:

I personally do not think that transferring permit authority to the States in this regard is sound. . . . This is the dumping of dredge material and fill in our Nation’s waterways and most importantly in our estuaries and wetlands which are important to our fish and wildlife resources, and, yes, to pollution control.

⁹ 961 F.2d 1310 [hereinafter *Hoffman Homes I*], vacated, 975 F.2d 1554 (7th Cir. 1992) [hereinafter *Hoffman Homes II*], *supp. op.*, 999 F.2d 256 (7th Cir. 1993) [hereinafter *Hoffman Homes III*].

¹⁰ *Hoffman Homes II*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

¹¹ *Hoffman Homes III*, 999 F.2d 256 (7th Cir. 1993).

The three *Hoffman Homes* decisions came after a procedural review of the EPA’s compliance order against *Hoffman Homes*. See *Hoffman Group, Inc. v. United States EPA*, 29 Env’t. Rep. Cas. (BNA) 1180 (N.D. Ill. 1989), *aff’d*, 902 F.2d 567 (7th Cir. 1990).

analysis, will argue that federal jurisdiction over intrastate wetlands is well-established, despite the waffling of the Seventh Circuit and despite the Supreme Court's refusal to address the issue in 1985.

Part I will discuss the nature and importance of wetlands and their relation to the CWA. Part II will recount the history of *Hoffman Homes I*. Parts III and IV will trace the analysis used by the Seventh Circuit in *Hoffman Homes I* when it rejected EPA jurisdiction over intrastate wetlands. Part III will examine the EPA's claim that it has jurisdiction over intrastate wetlands because Congress, through the doctrine of legislative ratification, implicitly authorized the jurisdiction when it amended the CWA in 1977. Part III will conclude that Congress did authorize this jurisdiction. Part IV will examine whether the CWA, independent of legislative ratification, confers jurisdiction over intrastate wetlands because of Congress' power under the Commerce Clause. Part IV will conclude that intrastate wetlands are sufficiently connected to interstate commerce to warrant regulation under the commerce power.

As an introductory note, intrastate wetlands are also referred to as isolated or nonadjacent wetlands, because they do not physically border an interstate waterbody. Likewise, interstate wetlands, those which do border interstate waterbodies, are also known as adjacent wetlands. To avoid confusion, "intrastate wetlands" shall be referred to only as such, while "interstate wetlands" shall be referred to as "adjacent wetlands."

I. WETLANDS AND THE CLEAN WATER ACT

Wetlands occur naturally and also may be created artificially.¹² They provide vital habitats to fish, birds, reptiles, and mammals.¹³ In addition,

¹² See *Leslie Salt Co. v. United States*, 896 F.2d 354, 355-56 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991), *on remand*, 820 F. Supp. 478 (N.D. Calif. 1992); *United States v. City of Fort Pierre*, 747 F.2d 464, 466-67 (8th Cir. 1984).

An artificially created wetland remains subject to federal jurisdiction under the CWA. *Leslie Salt Co.*, 896 F.2d at 358 ("The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local aquatic ecosystems regardless of their origin."); *Bailey v. United States*, 647 F. Supp. 44, 48 (D. Idaho 1986) ("Plaintiffs contend that . . . the fact that they were 'artificially created' . . . negates the court's assertion of [the Corps'] regulatory jurisdiction under the Clean Water Act. This argument is untenable . . ."); *Swanson v. United States*, 600 F. Supp. 802, 808 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986) ("Under the *Stimson* rationale, Congress's [sic] power to regulate commerce extends as the bounds of navigable waters are altered."); *United States v. Ciampitti*, 583 F. Supp. 483, 494, *later proceeding*, 615 F. Supp. 116 (D.N.J. 1984), *aff'd sub nom. (unpublished op.)*, Appeal of Ciampitti, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986), *later proceeding*, 669 F. Supp. 684 (D.N.J. 1987), *modified*, 27 Env't Rep. Cas. (BNA) 1567 (D.N.J. 1988) ("[T]he

wetlands provide benefits to humans in the form of flood and erosion control, water supply and purification, groundwater recharge, and pollution abatement.¹⁴ Wetlands also serve as recreational areas for activities such as hunting, bird-watching, and photography.¹⁵

The policy of the CWA¹⁶ "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁷ Section 404 of the CWA,¹⁸ which confers dual jurisdiction to the EPA and the Corps, provides for the Corps to issue permits "for the discharge of dredged or fill material into

fact that part of the area *may* have become wetlands because of a *manmade* connection between the site and tidal waterways is not dispositive of the Corps' jurisdiction The Act applies to wetlands without reference to the manner by which they came to be in that condition"); *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974) ("Polluting canals that empty into a bayou arm of Tampa Bay is clearly an activity Congress sought to regulate. The fact that these canals were man-made makes no difference."). *But see City of Fort Pierre*, 747 F.2d at 466 (rejecting jurisdiction over an artificially created wetland because of "the peculiar facts and unique circumstances" of the case). The Eighth Circuit, however, specifically limited its holding, noting that "our holding does not challenge the Corps' jurisdiction with regard to any other artificially created wetland-type environment." *Id.* at 467. In 1989, the Eighth Circuit rejected a challenge—based on *City of Fort Pierre*—to the Corps' jurisdiction over artificial wetlands, stating that the "argument is not well grounded We were careful to limit our holding [in *City of Fort Pierre*]." *United States v. Southern Inv. Co.*, 876 F.2d 606, 612 (8th Cir. 1989).

See generally Martin S. Lessner, Casenote, *Leslie Salt Co. v. United States: Keep the Birds out of Your Birdbath: It May Be Considered the Jurisdiction of the Army Corps of Engineers As a 'Water of the United States'*, 2 VILL. ENVTL. L.J. 463 (1991).

¹³ McCurdy, *supra* note 1, at 696.

¹⁴ *Id.* at 697; see also *Hoffman Homes I*, 961 F.2d 1310, 1316, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993) (quoting congressional debate over wetlands during the 1977 amendments to the CWA). According to one expert, the preservation of wetlands along the banks of the Mississippi River could have eased the flooding that occurred in States bordering the river during the spring and summer of 1993. Doug McInnis, *Wetlands Would Have Absorbed Rain, Eased Flood, Expert Says*, COLUMBUS DISPATCH, Aug. 31, 1993, at 5C.

¹⁵ McCurdy, *supra* note 1, at 697.

For more information on the importance of wetlands, see *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 533 n.11 (W.D. La. 1979), *later proceeding*, 511 F. Supp. 278 (W.D. La. 1981), *aff'd in part, rev'd in part*, 715 F.2d 897 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986); *United States v. Byrd*, 609 F.2d 1204, 1210 n.5 (7th Cir. 1979).

¹⁶ Before the 1977 amendments, the CWA was known as the Federal Water Pollution Control Act (FWPCA). Hedal, *supra* note 4, at 995 n.2.

¹⁷ 33 U.S.C. § 1251(a) (1988).

¹⁸ 33 U.S.C. § 1344 (1988).

the navigable waters at specified disposal sites.”¹⁹ The term “navigable waters” is defined as “the waters of the United States, including the territorial seas.”²⁰ A definition for “wetlands” is not included within the CWA.²¹

The EPA and the Corps share an identical regulatory definition for “waters of the United States,” one that encompasses adjacent and intrastate wetlands.²²

¹⁹ 33 U.S.C. § 1344(a) (1988).

²⁰ 33 U.S.C. § 1362(7) (1988).

²¹ *Hoffman Homes I*, 961 F.2d 1310, 1312, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

²² See 40 C.F.R. § 230.3(s) (1992) (EPA); 33 C.F.R. § 328.3(a) (1992) (Corps). See also *Hoffman Homes I*, 961 F.2d at 1313 n.5.

The complete definition for “waters of the United States” is as follows:

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

40 C.F.R. § 230.3(s) (1992) (EPA); 33 C.F.R. § 328.3(a) (1992) (Corps).

Initially, the Corps construed “waters of the United States” narrowly and confined its jurisdiction to those waters that were actually navigable in fact—“waters within the traditional navigational servitude.” Hedal, *supra* note 4, at 995 n.7. In *Natural Resources Defense Council, Inc. v. Calloway*, the court ordered the Corps to expand its jurisdictional

The Supreme Court has upheld as reasonable the Corps' interpretation of "waters of the United States" as including adjacent wetlands.²³ The EPA and the Corps include intrastate wetlands within their regulatory definition as part of "[a]ll other waters such as intrastate lakes, rivers, streams . . . wetlands, . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce" ²⁴

The EPA and Corps define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." ²⁵

II. HISTORY OF *HOFFMAN HOMES I*

During construction of a 43-acre housing subdivision, Hoffman Homes filled and graded a 0.8 acre bowl-shaped depression which, because of its clay

definition to "clearly recogniz[e] the full regulatory mandate of the Water Act." 392 F. Supp. 685, 686 (D.D.C. 1975). *See also* Hedal, *supra* note 4, at 1009.

Theoretically, the EPA and the Corps could have different regulatory definitions for "waters of the United States." That is unlikely, however, because an opinion from the U.S. Attorney General states that the CWA requires consistency. *See* Manning, *supra* note 6, at 866 n.44.

See also infra note 25, for more information on the agencies' regulatory definitions.

²³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

²⁴ 40 C.F.R. § 230.3(s)(3) (1992) (EPA); 33 C.F.R. § 328.3(a)(3) (1992) (Corps).

²⁵ 40 C.F.R. § 230.3(t) (1992) (EPA); 33 C.F.R. § 328.3(b) (1992) (Corps).

See also Avoyelles Sportsmen's League, Inc. v. Alexander, 511 F. Supp. 278 (W.D. La. 1981), *aff'd in part, rev'd in part*, 715 F.2d 897 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986), wherein the court explained:

It is quite obvious from this history that the terms "waters of the United States" and "wetlands" are not terms of pure science. They are not meant to be. "Wetlands" is a jurisdictional term, the product of the legislative process, of political pressure groups Thus, the "wetlands" definition does not answer a scientific need, it satisfies a practical, a social, a political need, the need to define the scope of Section 404 jurisdiction. It should be interpreted with this purpose in mind. The definition may be scientifically incorrect, but that should not affect its validity as a jurisdictional definition. A "wetlands" is what Congress (as reflected by the regulations) says it is.

511 F. Supp. at 288.

bottom, retained rain water.²⁶ The EPA found the depression to be a wetland,²⁷ asserted jurisdiction over it because of its potential use as a resting spot for migratory birds,²⁸ and fined Hoffman Homes \$50,000 for filling the wetland without a permit.²⁹ The developer appealed to an EPA administrative law judge, who ruled the EPA had no jurisdiction under the CWA because the wetland had no effect on interstate commerce.³⁰ The EPA appealed to its chief judicial officer, and that officer reversed the earlier decision, holding that the EPA had authority to regulate intrastate wetlands if they have a "minimal, potential effect" on interstate commerce."³¹ The chief judicial officer found that the EPA had demonstrated the minimal effect by proving that migratory birds could potentially use the wetland.³² Hoffman Homes appealed to the Seventh Circuit.

The Seventh Circuit analyzed the EPA's purported jurisdiction in two parts. First, the court studied the legislative history of the 1972 and 1977 amendments to the CWA and found that nothing therein indicated that Congress intended the law to reach intrastate wetlands.³³ Then the court dealt with its own precedent of *United States v. Byrd*,³⁴ in which that court had stated "that Congress intended the Clean Water Act to regulate 'all the "navigable waters" within its constitutional reach under the Commerce Clause.'"³⁵ Despite *Byrd*, the *Hoffman Homes I* court found the intrastate wetland to be beyond constitutional reach under the Commerce Clause, and thus beyond the EPA's jurisdiction under the CWA.³⁶

Five months later, the court granted the EPA's petition for rehearing, vacated its decision, and ordered settlement talks between the EPA and

²⁶ *Hoffman Homes I*, 961 F.2d 1310, 1311, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

²⁷ *Id.* at 1311.

²⁸ *Id.* at 1320. *See also infra* text accompanying notes 107-22.

²⁹ *Hoffman Homes I*, 961 F.2d at 1312. The EPA found that Hoffman violated §§ 301 and 404 of the CWA, 33 U.S.C. §§ 1311 ("Effluent limitations") and 1344 ("Permits for dredged or fill material"). *Hoffman Homes I*, 961 F.2d at 1311. For a partial text of those statutes, see *supra* note 4.

³⁰ *Hoffman Homes I*, 961 F.2d at 1312.

³¹ *Id.*

³² *Id.* For a history of the *Hoffman Homes* cases, see also *Hoffman Homes III*, 999 F.2d 256 (7th Cir. 1993).

³³ *Hoffman Homes I*, 961 F.2d at 1316.

³⁴ 609 F.2d 1204 (7th Cir. 1979).

³⁵ *Hoffman Homes I*, 961 F.2d at 1316 (quoting *Byrd*, 609 F.2d at 1209).

³⁶ *Id.* at 1321.

Hoffman Homes.³⁷ After those talks failed, the court issued a supplemental opinion, holding that the intrastate wetland could be subject to federal jurisdiction because of its potential effect on interstate commerce,³⁸ but that the EPA had failed to show evidence of any such potential effect, and therefore had no jurisdiction.³⁹

III. CONGRESSIONAL RATIFICATION OF EXPANSIVE CWA JURISDICTION

In *Hoffman Homes I*, the EPA claimed that section 404 of the CWA gave it jurisdiction over intrastate wetlands because Congress refused in 1977 to restrict the expanding scope of section 404.⁴⁰ During the 1977 debate over the CWA, the House of Representatives approved an amendment that limited section 404 jurisdiction to "traditionally navigable waters"⁴¹ and their adjacent wetlands.⁴² The Senate rejected an identical proposal,⁴³ and the final version that both chambers approved had no restrictive amendment.⁴⁴

The *Hoffman Homes I* court examined the legislative history of the 1977 CWA to determine if Congress, by refusing to restrict section 404 jurisdiction, thereby ratified the EPA's expansive construction of the law.⁴⁵ The court found no such authorization.⁴⁶ Yet, under the doctrine of legislative ratification, Congress in fact did approve an expansive jurisdiction under section 404, a jurisdiction that reaches intrastate wetlands.

³⁷ Hoffman Homes II, 975 F.2d 1554, 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

³⁸ Hoffman Homes III, 999 F.2d 256, 260-61 (7th Cir. 1993).

³⁹ *Id.* at 262.

⁴⁰ *Hoffman Homes I*, 961 F.2d at 1314-15.

⁴¹ 123 CONG. REC. 38,968 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 348 (1978) (statement of Rep. Roberts); *Hoffman Homes I*, 961 F.2d at 1315. Navigable waters are "those waters which are presently used or are susceptible to use in their present condition or with reasonable improvement to transport interstate or foreign commerce." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 97 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 281, and in 1977 U.S.C.A.A.N. 4424, 4472.

⁴² 3 LEGISLATIVE HISTORY, *supra* note 7, at 281 ("Section 16 amends section 404 of the Federal Water Pollution Control Act by limiting the requirement for a permit to navigable waters and adjacent wetlands.").

⁴³ *Hoffman Homes I*, 961 F.2d at 1315.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1314-16.

⁴⁶ *Id.* at 1316.

A. *The Doctrine of Ratification*

The doctrine of legislative ratification "is a judicial doctrine that holds, in broad terms, that reenactment or amendment of a statute with congressional knowledge or approval of a prior administrative interpretation of parts of that statute evinces congressional approval of that interpretation unless Congress indicates otherwise."⁴⁷ Congressional knowledge of an agency's administrative interpretation may suffice to demonstrate ratification, while sometimes explicit congressional approval is required.⁴⁸

Primarily, ratification is a matter of deference to an agency's statutory interpretation.⁴⁹ More deference is given to contemporaneous interpretations of an enabling statute and to interpretations that comply with the apparent meaning of the statute.⁵⁰ The judicial policy of deference is a long-standing one,⁵¹ and in *Riverside Bayview Homes*⁵²—the 1985 case involving adjacent wetlands—the Supreme Court reiterated its allegiance to the doctrine: "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of

⁴⁷ James L. Conner II, Note, *Environmental Law—Nationwide Permits for Categories of Waters Issued by the Corps of Engineers Under FWPCA Section 404: A Legitimate Administrative Interpretation Ratified by Congress?*, 61 N.C.L. REV. 904, 914 (1983).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) ("It is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.'" (citation omitted)); *United States v. Rutherford*, 442 U.S. 544, 553 (1979) ("As this Court has often recognized, the construction of a statute by those charged with its administration is entitled to substantial deference." (citation omitted)); *SEC v. Sloan*, 436 U.S. 103, 118 (1978) ("The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" (citation omitted)); *Zuber v. Allen*, 396 U.S. 168, 192 (1969) ("[T]his Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction." (citation omitted)); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) ("[T]he equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.").

⁵² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Congress.”⁵³ The Seventh Circuit acknowledged this policy of deference in *Hoffman Homes I*⁵⁴ and in *Hoffman Homes III*.⁵⁵

B. Legislative History

As noted earlier, “wetlands” fall within the terms “navigable waters” and “waters of the United States.”⁵⁶ The legislative history to the 1972 CWA amendments contains no reference to wetlands,⁵⁷ and as noted in *Hoffman*

⁵³ *Id.* at 131 (citing *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842–45 (1984)).

The Court in *Riverside Bayview Homes* cited only a small portion of what the *Chevron* Court stated. In *Chevron*, the Court set up a two-part analysis for reviewing an agency’s statutory interpretation:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842–43 (citations omitted).

Furthermore, an agency’s interpretation of its own regulation is entitled to even more deference. *Hoffman Homes I*, 961 F.2d 1310, 1313 n.6, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 911 n.27 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986).

⁵⁴ 961 F.2d at 1313.

⁵⁵ 999 F.2d at 260.

⁵⁶ See *supra* text accompanying notes 16–25.

⁵⁷ *Hoffman Homes I*, 961 F.2d at 1313.

The 1977 Congress, however, firmly believed that the CWA was intended to protect wetlands. See 123 CONG. REC. 38,995 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 417 (indicating that the Clean Water Act of 1977 does not provide for “the protection established in 1972 for our Nation’s dwindling supply of wetlands.”) (statement of Rep. Dingell); 123 CONG. REC. 39,212 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 532 (“The Water Pollution Control Act was designed to protect the quality of water and to protect critical wetlands in concert with the various States. In short a responsible Federal role.”) (statement of Sen. Wallop).

Homes I,⁵⁸ the only expression of intent regarding the meaning of "navigable waters" lies in this statement from the conference committee: "The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."⁵⁹

During the 1977 amendments, wetlands and their importance were noted extensively⁶⁰ when the House of Representatives tried to restrict section 404's jurisdiction. The Supreme Court in *Riverside Bayview Homes*⁶¹ found that Congress, by refusing to adopt the restrictions, thereby accepted the Corps' jurisdiction over adjacent wetlands.⁶² The Supreme Court specifically declined to address the jurisdiction over intrastate wetlands,⁶³ but the *Hoffman Homes I* court found the reasoning of *Riverside Bayview Homes*—that adjacent wetlands are hydrologically related to adjacent waters⁶⁴—to bar EPA jurisdiction over intrastate wetlands because of the supposed absence of any such relation.⁶⁵ The *Hoffman Homes I* court also found the legislative debate to center exclusively on adjacent wetlands⁶⁶—a dubious conclusion.⁶⁷

⁵⁸ 961 F.2d at 1313.

⁵⁹ S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144 (1972), reprinted in 1972 U.S.C.A.A.N. 3776, 3822.

⁶⁰ *Hoffman Homes I*, 961 F.2d at 1315–16 (quoting congressional debate); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987), on remand, 699 F. Supp. 324 (D.D.C. 1988) ("Narrowing our scrutiny to Sections 301(a) and 404(a), we easily discern an effort to halt the systematic destruction of the Nation's wetlands."); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525, 533 (W.D. La. 1979), later proceeding, 511 F. Supp. 278 (1981), aff'd in part, rev'd in part, 715 F.2d 897 (5th Cir. 1983), later proceeding, 786 F.2d 631 (5th Cir. 1986) ("A basic policy of the FWPCA is the protection of our nation's wetlands and the important functions they serve. The legislative history of the Clean Water Act amendments of 1977 reflects an abiding congressional concern with the functional importance of wetlands.").

⁶¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁶² *Id.* at 137 ("Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.").

⁶³ *Id.* at 131 n.8; see also *supra* note 6.

⁶⁴ *Riverside Bayview Homes*, 474 U.S. at 133–34.

⁶⁵ *Hoffman Homes I*, 961 F.2d 1310, 1314, vacated, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

For an argument that intrastate wetlands are hydrologically related to adjacent wetlands, see *infra* text accompanying notes 131–135.

⁶⁶ *Hoffman Homes I*, 961 F.2d at 1316.

The *Hoffman Homes I* court, however, overlooked a crucial implication of Congress' refusal to restrict the jurisdiction of section 404. Those desiring to limit the CWA's jurisdiction proposed restricting the term "navigable waters" to "waters navigable in fact *and their adjacent wetlands*."⁶⁸ As so stated, the amendment implicitly acknowledged that without such a restriction, the CWA reached waters beyond those navigable in fact and their adjacent wetlands, because if it did not reach those other waters, there would be no need for the restrictive amendment. In other words, without the amendment restricting jurisdiction to navigable waters and their adjacent wetlands, the CWA extended beyond those waters. Thus, by rejecting the restrictive amendment, Congress affirmed that the CWA's jurisdiction extends beyond waters navigable in fact and their adjacent wetlands and reaches other waters as well.

In addition, the 1977 CWA provides "for the administration by a State of its own permit program for the regulation of the discharge of dredged or fill material into the navigable waters *other than traditionally navigable waters and adjacent wetlands*"⁶⁹ This section demonstrates that Congress presumed CWA jurisdiction over those other waters, but was willing to allow the states to exercise jurisdiction in some instances.

⁶⁷ For example, within the legislative history cited by *Hoffman Homes I* is the statement that "[w]etlands . . . provide a spawning ground for a huge variety of fish and waterfowl." *Id.* As waterfowl or fish may breed in either adjacent wetlands or intrastate wetlands, no distinction between the two is drawn by the above statement.

See also *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 533 n.11 (W.D. La. 1979), *later proceeding*, 511 F. Supp. 278 (1981), *aff'd in part, rev'd in part*, 715 F.2d 897 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986) ("Without [§ 404], critical aquatic areas including swamps, marshes, and submerged grass flats, which are such an important segment of this Nation's water resource and are essential to the preservation of migratory and resident fish, bird and other animal populations, might otherwise be irrevocably destroyed."); Jackson, *supra* note 2, at 317 ("[T]he need to protect 'essential nesting and wintering areas for waterfowl' in wetlands was frequently cited in the 1977 congressional debates on the appropriate scope of section 404 jurisdiction over wetlands."); *id.* at 324 ("[The senator's] statements and those of his colleagues evince no intent to distinguish among types of wetlands for constitutional, jurisdictional, or any other purposes. Congressional intent to preserve section 404 jurisdiction is thus just as clear for isolated wetlands as adjacent wetlands." (citations omitted)).

⁶⁸ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985).

As codified, the term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1988).

⁶⁹ H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479 (emphasis added).

Do those other waters include intrastate wetlands?⁷⁰ Congress gave no explicit indication, leaving the definition of "navigable waters" unchanged: "the waters of the United States, including the territorial seas."⁷¹ The EPA has issued regulations including intrastate wetlands as part of "the waters of the United States,"⁷² and the interpretation is entitled to deference "if it is reasonable and not in conflict with the expressed intent of Congress."⁷³ Given the expansive interpretation of the CWA consistently provided by the courts,⁷⁴ the EPA's interpretation of the CWA as reaching intrastate wetlands is reasonable.

Furthermore, the EPA's inclusion of intrastate wetlands does not conflict with Congress' intent. In rejecting the restrictive amendment, Congress affirmed its original intent to have the CWA "be given the broadest possible constitutional interpretation."⁷⁵ The Supreme Court has stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to

⁷⁰ See Jackson, *supra* note 2, at 325 n.107 ("If Congress felt that § 404 did not include jurisdiction over nonadjacent wetlands, it would be illogical to amend the CWA to provide for turning federal jurisdiction over these wetlands back to the states since there would be little or no federal jurisdiction over these areas to begin with."); see also *id.* at 327 ("By rejecting such amendments, Congress even more persuasively demonstrated its recognition that section 404 covered nonadjacent wetlands and its intent to leave that jurisdiction intact.").

⁷¹ 33 U.S.C. § 1362(7) (1988).

⁷² 40 C.F.R. § 230.3(s)(3) (1992).

⁷³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

⁷⁴ See *infra* note 94 and accompanying text; see also Manning, *supra* note 6, at 867 ("Weaknesses notwithstanding, the Court [in *Riverside Bayview Homes*] confirmed the broad interpretation of 'waters of the United States' as consistent with the view of the CWA held by environmentalists, the EPA, and the majority of courts."); Jackson, *supra* note 2, at 325 ("One reason for concluding that . . . *Riverside Bayview* applies with equal force to isolated wetlands is that isolated wetlands serve many of the same functions as adjacent wetlands. Thus, the reasoning . . . in *Riverside Bayview* would seem to suggest that the inclusion of isolated . . . wetlands in the section 404 regime comports with Congress' goals . . .").

⁷⁵ See *supra* note 59 and accompanying text; see also 123 CONG. REC. 39,187 (1977), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 7, at 470 ("The conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters.") (statement of Sen. Muskie); 123 CONG. REC. 39,209 (1977), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 7, at 523 ("First, the conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent.") (statement of Sen. Baker).

great weight in statutory construction.”⁷⁶ The 1977 CWA reinforces the original, expansive intent of the CWA. Therefore, the EPA’s interpretation of the law as extending jurisdiction to intrastate wetlands deserves judicial deference because it meets the criteria of *Riverside Bayview Homes*: it “is reasonable and not in conflict with the expressed intent of Congress.”⁷⁷

C. Congressional Knowledge or Approval

The question remains whether Congress, when it rejected the restrictive amendment, had knowledge of or intended to approve the expansive jurisdiction now claimed by the EPA.⁷⁸ When construing the CWA in 1977, the EPA’s interpretation of “waters of the United States” did not specifically include intrastate wetlands,⁷⁹ as its current regulation now does.⁸⁰ The 1977 regulation, however, did include

those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 C.F.R. 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(h) a decision on jurisdiction shall be made by the District Engineer.⁸¹

Thus, in 1977 the EPA clearly stated that it would extend section 404 jurisdiction to intrastate wetlands, albeit on a case-by-case basis. Furthermore,

⁷⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380–81 (1969). “This principle is a venerable one.” *Id.* at 381 n.8. *But see Hoffman Homes I*, 961 F.2d 1310, 1315, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256, (7th Cir. 1993). The court stated that:

We hesitate to attribute any level of significance to Congress’ failure to amend section 404. The views of the 95th Congress in 1977 regarding the extent of the section 404 permit authority established by the 92d Congress in 1972 are, at best, very questionable evidence of the intent of Congress in 1972. . . . “[S]ubsequent legislative history is a hazardous basis for inferring intent of an earlier” Congress.

961 F.2d at 1315 (citation omitted).

⁷⁷ *Riverside Bayview Homes*, 474 U.S. at 135 (1985).

⁷⁸ See *supra* text accompanying notes 47 and 48.

⁷⁹ 40 C.F.R. pt. 230, app. A (1977).

⁸⁰ 40 C.F.R. § 230.3(s)(3) (1992).

⁸¹ 40 C.F.R. pt. 230, app. A(2)(i) (1977).

the Corps also issued regulations in 1977 that included "isolated wetlands" as part of its definition of "waters of the United States."⁸²

Debate over the restrictive amendment itself demonstrates that Congress knew of the expanding jurisdictional role for the EPA and the Corps under the CWA. The debate in both chambers was "lengthy,"⁸³ and after each chamber approved its draft of the CWA, a conference committee assembled the final version.⁸⁴ In addition, the House of Representatives knew specifically of the district court decision⁸⁵ that recognized the CWA's expansive role and ordered the Corps to expand its jurisdiction.⁸⁶ Presumably, Congress knew of the 1972 legislative intent to expand the CWA to its fullest constitutional extent.⁸⁷

Congress had knowledge, but did it approve the expansive jurisdiction now claimed under the CWA? It is clear that Congress rejected any attempts to shrink the jurisdiction. It is also clear that Congress approved the original, expansive intent of the CWA: to stop pollution in all the waters of the United States. Congress did not attempt to define a specific degree of jurisdiction; rather, Congress exempted from section 404 certain activities that normally would be regulated,⁸⁸ and these exemptions are to be narrowly construed.⁸⁹

⁸² 33 C.F.R. § 323.2(a)(5) (1978). The regulation first appeared on July 19, 1977, at 42 Fed. Reg. 37,144.

⁸³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985); *see also* *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 915 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986) ("When Congress rejected the attempts to limit the Corps' jurisdiction in 1977, it was well aware of the extension of that jurisdiction beyond the traditional definition of 'navigable waters' . . .").

⁸⁴ *Riverside Bayview Homes*, 474 U.S. at 137.

⁸⁵ *See supra* note 22.

⁸⁶ 123 CONG. REC. 38,967-68 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 347 (statement of Rep. Roberts).

⁸⁷ *See supra* text accompanying note 59.

⁸⁸ H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 100-01 (1977), *reprinted in* 1977 U.S.C.A.A.N. 4424, 4475-76; *see also* 3 LEGISLATIVE HISTORY, *supra* note 7, at 349 (statement of Rep. Roberts).

⁸⁹ 123 CONG. REC. 38,973 (1977), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 7, at 420 ("New Subsection (f) of Section 404 provides that Federal permits will not be required for narrowly defined activities specifically identified in paragraphs A-F that cause little or no adverse effects either individually or cumulatively.") (statement of Rep. Harsha); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525, 535 (W.D. La. 1979), *later proceeding*, 511 F. Supp. 278 (W.D. La. 1981), *aff'd in part, rev'd in part*, 715 F.2d 897 (5th Cir. 1983), *later proceeding*, 786 F.2d 631 (5th Cir. 1986) ("[T]he legislative history to the Clean Water Act indicates that the exemptions to the § 404 permit program should be narrowly construed.").

Congress' re-enactment of section 404, unchanged as to its jurisdictional role, demonstrates approval of the jurisdiction now claimed by the EPA.

In summary, under the doctrine of legislative ratification, Congress has authorized the EPA's jurisdiction over intrastate wetlands. When faced in 1977 with attempts to narrowly define the CWA's jurisdiction, Congress refused. Instead, it reinforced the original, expansive intent of the CWA. At the time of its refusal, Congress knew of the broad interpretation given to the CWA by the courts, the EPA and the Corps. By rejecting a narrow jurisdiction, Congress ratified the EPA's interpretation of the CWA, which includes intrastate wetlands as part of the "waters of the United States."

The EPA, however, need not rely solely on the doctrine of legislative ratification for its jurisdiction over intrastate wetlands. The extension of CWA jurisdiction over intrastate wetlands also conforms with Congress' power under the Commerce Clause.

IV. THE COMMERCE CLAUSE AND THE CWA

Even though *Hoffman Homes I* concluded that the CWA did not reach intrastate wetlands,⁹⁰ the Seventh Circuit's own precedent compelled the court to examine whether the intrastate wetland was within Congress'—and therefore the CWA's—reach under the Commerce Clause.⁹¹ The court, noting a weak relation between the wetland and interstate commerce, erroneously ruled there was no jurisdiction.⁹² The wetland's connection to interstate commerce, however, suffices to warrant congressional regulation under the Commerce Clause.⁹³

A. The Commerce Clause Power

Congress intended the CWA to reach all the nation's waters, to the fullest extent possible under the Commerce Clause.⁹⁴ The commerce power "is

⁹⁰ *Hoffman Homes I*, 961 F.2d 1310, 1316, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

⁹¹ See *supra* notes 33–36 and accompanying text.

⁹² *Hoffman Homes I*, 961 F.2d at 1321.

⁹³ "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." U.S. CONST. art. I, § 8, cl. 3.

⁹⁴ See, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991), *on remand*, 820 F. Supp. 478 (N.D. Cal. 1992) ("We agree with the district court that Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the

complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."⁹⁵ Under the Commerce Clause, Congress may control intrastate activities that affect commerce in other states.⁹⁶ Once Congress determines that an activity affects

commerce clause power."); *Utah v. Marsh*, 740 F.2d 799, 802 (10th Cir. 1984) ("It is generally agreed that Congress, by adopting this definition, intended to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability." (citations omitted)); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 286 (W.D. La. 1981) ("Congress effectively implemented its intent (1) to extend the Act's jurisdiction to the Constitutional limit, (2) to extend the broadest protection possible to the nation's full hydrologic cycle . . ."), *aff'd in part, rev'd in part*, 715 F.2d 897, 914-15 (5th Cir. 1983) ("As the district court recognized, Congress had lofty goals in enacting the CWA Congress expressly stated its intent 'that the term "navigable waters" be given the broadest constitutional interpretation.' . . . The report . . . explained the need for a broad definition of 'navigable waters'. . ."), *later proceeding*, 786 F.2d 631 (5th Cir. 1986); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979) ("The legislative history of the Amendments establishes that Congress wanted to give the term 'navigable waters' the 'broadest possible constitutional interpretation' . . ."); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978) ("This court has indicated that the term 'navigable waters' within the meaning of the FWPCA is to be given the broadest possible constitutional interpretation under the Commerce Clause ('Congress clearly meant to extend the Act's jurisdiction to the constitutional limit.').") (citations omitted); *see also* *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) ("In addition, we think that the CWA should be liberally construed to achieve its objectives . . ."); *United States v. Ciampitti*, 583 F. Supp. 483, 494, *later proceeding*, 615 F. Supp. 116 (D.N.J. 1984), *aff'd sub nom. (unpublished op.)*, Appeal of *Ciampitti*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986), *later proceeding*, 669 F. Supp. 684 (D.N.J. 1987), *modified*, 27 Env't Rep. Cas. (BNA) 1567 (D.N.J. 1988) ("Congress intended to exercise its jurisdiction under the Clean Water Act to the greatest extent possible in order to protect our environment . . ."); *United States v. Weisman*, 489 F. Supp. 1331, 1338 (M.D. Fla. 1980) ("It is therefore clear that Congress intended to protect the waters of the United States in a plenary, geographic sense, and that wetlands are specifically included within that protection."); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) ("Congress by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent possible under the Commerce Clause of the Constitution."); *Jackson*, *supra* note 2, at 337 ("[T]he courts are repeatedly upholding broad agency authority under section 404."); *see supra* text accompanying note 59.

⁹⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

⁹⁶ *Id.* at 195; *see also* *Wickard v. Filburn*, 317 U.S. 111, 122 (1942) and cases cited therein; *Swanson v. United States*, 600 F. Supp. 802, 807 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986) ("There is little dispute that Congress has wide constitutional power to regulate interstate commerce and activities touching thereon.").

interstate commerce, "the courts need inquire only whether the finding is rational."⁹⁷

The Supreme Court has repeatedly held that any local activity—whether it affects interstate commerce in fact or merely has the potential to affect it—may be regulated by Congress under the commerce power. In *Wickard v. Filburn*,⁹⁸ the Court stated,

But even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."⁹⁹

The size of the impact on interstate commerce is irrelevant to whether the activity may be regulated under the commerce power: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."¹⁰⁰

The Court has extended these principles to classes of regulated activities, again noting the irrelevance of any single activity affecting interstate commerce. In *Perez v. United States*,¹⁰¹ the Court stated: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."¹⁰² Once the class of activities is deemed within reach of the commerce power, the Court has never required the connection to interstate commerce to be absolute. In *Heart of Atlanta Motel, Inc. v. United States*,¹⁰³ the Court stated: "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local

⁹⁷ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

⁹⁸ 317 U.S. 111 (1942).

⁹⁹ *Id.* at 125.

¹⁰⁰ *Id.* at 127-28.

¹⁰¹ 402 U.S. 146 (1971).

¹⁰² *Id.* at 154 (citation omitted); *see also* *Hodel v. Indiana*, 452 U.S. 314, 324 (1981) ("The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."); *Utah v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984) ("Moreover, the triviality of an individual's act is irrelevant so long as the class of such acts might reasonably be deemed nationally significant in their aggregate economic effect." (citations omitted)).

¹⁰³ 379 U.S. 241 (1964).

activities . . . which *might* have a substantial and harmful effect upon that commerce."¹⁰⁴ Again, in *Katzenbach v. McClung*,¹⁰⁵ one Justice stated:

[W]e do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature *may* impose a burden on interstate commerce by reducing its volume or distorting its flow.¹⁰⁶

Under the Commerce Clause, Congress may choose to regulate a class of activities affecting interstate commerce, and whether each member of that class individually affects interstate commerce is immaterial—it too may be regulated. The Seventh Circuit in *Hoffman Homes I* and *III* improperly focused on the specific wetland filled by the developer and ignored its membership in a larger class of intrastate wetlands whose destruction may affect interstate commerce.

B. *Intrastate Wetland Connections to Interstate Commerce*

1. *Migratory Birds*

The EPA in the *Hoffman Homes* cases based its jurisdiction over intrastate wetlands on the potential use of those wetlands by migratory birds.¹⁰⁷ The

¹⁰⁴ *Id.* at 258 (emphasis added).

¹⁰⁵ 379 U.S. 294 (1964).

¹⁰⁶ *Id.* at 295 (Black, J., concurring) (emphasis added).

¹⁰⁷ *Hoffman Homes I*, 961 F.2d 1310, 1320, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.* 999 F.2d 256 (7th Cir. 1993).

This jurisdictional basis arises from a 1985 EPA memorandum. Jackson, *supra* note 2, at 336. The EPA memorandum asserting the jurisdiction states:

'[I]f a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition [of "waters of the United States"] (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).'

Jackson, *supra* note 2, at 336.

The Corps also asserts jurisdiction over intrastate wetlands, based partially on the use of the wetlands by migratory birds. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd (unpublished op.)*, 885 F.2d 866 (4th Cir. 1989) ("Waters which are used or could be used as habitat by other migratory birds which cross state lines.'").

interstate movement of animals (and potential for such movement) constitutes interstate commerce.¹⁰⁸ Federal courts have found the potential use of intrastate wetlands by migratory birds to put those wetlands within Congress' power under the Commerce Clause.¹⁰⁹ In *Hoffman Homes I*, the court rejected

¹⁰⁸ See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (finding that state law forbidding out-of-state transport of minnows grown in Oklahoma violates Commerce Clause); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977) (holding that Virginia law forbidding fishing within state's territorial waters by federally licensed ships owned by out-of-state residents violates Commerce Clause); see also *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding federal control over certain birds pursuant to a treaty with Great Britain). In *Missouri*, the state asserted ownership over the birds and challenged the act and treaty as interfering with states' rights. The Court dismissed the states' ownership claim by describing the birds' interstate characteristics: "Wild birds are not in the possession of anyone . . . [B]irds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." *Id.* at 434.

Although the Court in *Missouri* relied on the treaty power in rejecting the state's challenge to federal jurisdiction, its analysis reflects modern Commerce Clause principles. The Court noted that the protected birds "were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination . . ." *Id.* at 431. "We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed." *Id.* at 435. Congress may properly invoke its commerce power to regulate the destruction of crops that could move in interstate commerce. See, e.g. *Wickard v. Filburn*, 317 U.S. 111 (1942); see also *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), *later proceeding*, 631 F. Supp. 787 (D. Haw. 1985), *later proceeding*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). The district court upheld the enforcement of the Endangered Species Act, enacted by Congress under the Commerce Clause, on behalf of a purely intrastate bird, the Palila, which "exists in nature only on the slopes of the Island of Hawaii in the State of Hawaii." *Palila*, 471 F. Supp. at 992. The Court noted that:

[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

Id. at 995. The court reached its holding despite evidence that the Palila was nonmigratory and "remains within the confines of one state." *Id.* at 992 n.26, 993 n.28.

¹⁰⁹ See *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991), *on remand*, 820 F. Supp. 478 (N.D. Cal. 1992) ("[M]igratory birds . . . and one endangered species may have used the property as habitat. The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and

jurisdiction over the intrastate wetland by requiring evidence of human activity with the birds;¹¹⁰ in *Hoffman Homes III*, the court required evidence of actual birds' use of the wetland to establish a connection with interstate commerce.¹¹¹ In both cases, the court improperly confined the commerce power.

Congress in the CWA intended to regulate all those waters that affect interstate commerce,¹¹² and it did not distinguish between intrastate and adjacent wetlands in the 1977 CWA.¹¹³ The Supreme Court does not require an actual connection to interstate commerce in every instance, only a plausible connection among the class of regulated activities.¹¹⁴ If Congress' conclusion that intrastate wetlands affect interstate commerce is rational, the Court must uphold it.¹¹⁵

An intrastate wetland may affect interstate commerce by attracting hunters and photographers who travel to the wetland from other states.¹¹⁶ The

endangered species."); *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) ("Finally, the lake is on the flyway of several species of migratory waterfowl which are protected under international treaties."). *But see Leslie Salt Co.*, 896 F.2d at 361 n.1 (Rymer, J., concurring in part, dissenting in part) (stating that facts other than the presence of waterfowl also contributed to the court's decision in *Marsh*); *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd* (*unpublished op.*), 885 F.2d 866 (4th Cir. 1989) ("Although this Court has grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction, we do not here decide that issue.") (negating jurisdiction over intrastate wetlands because the Corps failed to follow formal rule-making procedure in determining its jurisdiction); *Hoffman Homes III*, 999 F.2d 256, 263 (7th Cir. 1993) (Manion, J. concurring) ("I would hold that the Commerce Clause does not empower Congress to regulate isolated wetlands such as Area A. The commerce power . . . is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink." (citations omitted)).

For another treatment of this issue see *National Wildlife Fed'n v. Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987), in which the court squarely posed the question: "Do the federal defendants, the EPA and Army Corps of Engineers, have jurisdiction pursuant to the Clean Water Act . . . over a South Texas pond visited by migratory birds?" *Id.* at 549. The court failed to reach the question because both parties voluntarily "concluded that a wetland visited by migratory birds is a wetland within the jurisdiction of the federal defendants." *Id.*

¹¹⁰ *Hoffman Homes I*, 961 F.2d at 1320.

¹¹¹ *Hoffman Homes III*, 999 F.2d at 262.

¹¹² See *supra* note 94 and accompanying text.

¹¹³ See *supra* note 67.

¹¹⁴ See *supra* text accompanying notes 98-106.

¹¹⁵ See *supra* text accompanying note 97.

¹¹⁶ *Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984); see also *Hoffman Homes III*, 999 F.2d 256, 261 (7th Cir. 1993) ("Throughout North America, millions of people

destruction of intrastate wetlands may harm interstate commerce because it would decrease the possible nesting grounds for migratory birds,¹¹⁷ which would reduce the birds' populations, which in turn would reduce the interstate commerce generated by people traveling to hunt¹¹⁸ or photograph the birds.¹¹⁹

Because of this effect on interstate commerce, intrastate wetlands fall within the class of activities to be regulated by the CWA.¹²⁰ That the EPA failed to show actual use of the wetland by migratory birds, then, is not dispositive. Nor is it material that the EPA failed to demonstrate an actual effect on interstate commerce by the specific wetland that Hoffman Homes filled. The intrastate wetland falls within a class of activities regulated by the CWA, and the class of intrastate wetlands, because of its potential effect on interstate commerce, is "within the reach of federal power."¹²¹ The Commerce Clause requires no more. "Once Congress has . . . elected to exercise its commerce clause power to the fullest extent, individual wetlands are covered even if their destruction has *no* effect on interstate commerce."¹²²

2. Pollution

The CWA also provides jurisdiction over intrastate wetlands because of pollution's interference with interstate commerce. It is unquestioned that polluting the environment affects interstate commerce and may be regulated under the Commerce Clause. The fact was recognized by federal courts as early as 1971, before the first significant CWA amendments. One court has stated that

annually spend more than a billion dollars on hunting, trapping, and observing migratory birds.").

¹¹⁷ See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1970-1990: TWENTIETH ANNUAL REPORT 7-10 (1990), *reprinted in* ROGER W. FINDLEY ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 19, 21 (3d ed. 1991) ("Trends in waterfowl populations, which rely upon wetlands during breeding and migration indicate the declining health of wetlands. Populations of mallard ducks have dropped by about 40 percent during the past 20 years [E]ncroachment on wetlands has overtaxed even that species' ability to adapt.").

¹¹⁸ Jackson, *supra* note 2, at 316-17.

¹¹⁹ See Jackson, *supra* note 2, at 317, for other examples of how the destruction of wetlands affects interstate commerce (discussing pollution control, groundwater recharge and flood prevention,); *see also supra* note 22 (noting that the definition of "waters of the United States" includes waters that could be used by interstate or foreign travelers for recreation or other purposes).

¹²⁰ See *supra* note 109 and accompanying text.

¹²¹ *Perez v. United States*, 402 U.S. 146, 154 (1971).

¹²² Jackson, *supra* note 2, at 319.

[T]he nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce. . . . Nor is it challenged that dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially. Because of these *potential* effects, Congress has the power to regulate such projects.¹²³

According to a second court, "It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution."¹²⁴

The Supreme Court affirmed the lower courts' findings in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,¹²⁵ when the Court stated: "Finally, we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulations of activities causing air or water pollution, or other environmental hazards that *may* have effects in more than one State."¹²⁶

Despite the contrary conclusion in *Hoffman Homes I*,¹²⁷ the pollution of intrastate wetlands by filling them does affect interstate commerce. The primary distinction between intrastate and adjacent wetlands is definitional: their proximity to other water bodies. Adjacent wetlands physically touch interstate waters, whereas intrastate wetlands do not. Yet intrastate wetlands perform the same functions as adjacent wetlands,¹²⁸ among them the "natural treatment of waterborne and airborne pollutants."¹²⁹ Filling an intrastate wetland would

¹²³ *Zabel v. Tabb*, 430 F.2d 199, 203-04 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (emphasis added).

¹²⁴ *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974).

¹²⁵ 452 U.S. 264 (1981).

¹²⁶ *Id.* at 282 (emphasis added); *see also Hodel v. Indiana*, 452 U.S. 314, 329 (1981) ("Congress adopted the . . . Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the *environment*, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce.") (emphasis added).

¹²⁷ *Hoffman Homes I*, 961 F.2d 1310, 1319, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993). The court in *Hoffman Homes III* did not address pollution.

¹²⁸ *Jackson*, *supra* note 2, at 325; *see also id.* at 326 ("Isolated wetlands, while not adjacent to water bodies, can also affect water quality, and can thus also further the goals of the CWA [I]solated wetlands perform the same kind of wildlife functions as adjacent wetlands.").

¹²⁹ *United States v. Byrd*, 609 F.2d 1204, 1210 n.5 (7th Cir. 1979).

eliminate its pollution control services and lead to increased pollution, thereby becoming an "activit[y] causing air or water pollution."¹³⁰

Moreover, the polluting of intrastate wetlands affects interstate commerce because intrastate wetlands—although physically separate from interstate water bodies—are not necessarily hydrologically isolated from those waters. For example, intrastate wetlands may prevent the flooding of interstate waters.¹³¹ As stated during the 1972 CWA amendments, "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."¹³² Because of the hydrologic cycle, water polluted at an intrastate source may affect interstate waters. "[V]irtually all water everywhere on the planet is linked. Whether a water molecule exists as water vapor in the atmosphere, precipitation, ice, surface or ground water, it is all the same water and it is all interchangeable."¹³³ Furthermore, as one commentator has stated:

Many wetlands not adjacent to open water are nonetheless hydrologically connected to it, and their destruction or pollution will eventually affect the quality of the connected waters. And even those wetlands that are hydrologically isolated from other waters are ecologically connected, serving as feeding or breeding grounds for migratory birds that are key components of aquatic ecosystems. The connection may seem small, but cumulative loss of small, isolated wetlands, such as the prairie potholes of the northern Great Plains or the playa lakes of the Great Basin, could have a devastating effect on migratory shorebirds that are part of the ecological balance at other wetland sites.¹³⁴

Because polluting interstate waters and their adjacent wetlands affects interstate commerce,¹³⁵ polluting intrastate wetlands that are hydrologically connected to those waters also affects interstate commerce.

¹³⁰ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

¹³¹ Jackson, *supra* note 2, at 322 ("[T]he adjacency test unrealistically assumes that nonadjacent wetlands are 'isolated' from other water bodies when in fact they are not. For example, prairie pothole wetlands occur in slight depressions in a relatively flat plain and as a result they may retain surface runoff that would otherwise flood river channels that may be miles away.").

¹³² S. REP. NO. 414, 92d Cong., 2d Sess. 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742.

¹³³ Jackson, *supra* note 2, at 322.

¹³⁴ Kenneth L. Rosenbaum, *The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA §404*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10008, 10011 (Jan. 1986).

¹³⁵ *Hoffman Homes I*, 961 F.2d 1310, 1319, *vacated*, 975 F.2d 1554 (7th Cir. 1992), *supp. op.*, 999 F.2d 256 (7th Cir. 1993).

V. CONCLUSION

Wetlands are a valuable natural resource, serving both humans and animals, yet they are being destroyed by encroaching developers. Congress enacted the Clean Water Act to protect the integrity of the nation's waters, and to do so, it provided for the EPA and the Army Corps of Engineers to oversee the dredging and filling of all bodies of water. The Supreme Court has held that under the CWA, the agencies may regulate wetlands adjacent to interstate wetlands. Before vacating its decision, the Seventh Circuit held that intrastate wetlands cannot be regulated under the CWA. In a supplemental opinion, the Seventh Circuit held that intrastate wetlands may be regulated, but it rejected jurisdiction over the intrastate wetland at issue by requiring evidence of an actual effect on interstate commerce. This Comment has shown that the first decision was flatly wrong, and that the second decision improperly narrowed the commerce power.

When amending the CWA in 1977, Congress reaffirmed the original 1972 intent to give the CWA the broadest interpretation possible under the Constitution. Congress specifically refused to restrict the scope of the CWA, noting extensively that to do so would have endangered the protection afforded to wetlands by the CWA. Congress did not distinguish between adjacent and intrastate wetlands, instead presuming CWA jurisdiction over both types. Congress therefore ratified the EPA's construction of the CWA as giving it jurisdiction over intrastate wetlands.

In addition, federal courts have uniformly held the CWA to reach to the full extent of Congress' power under the Commerce Clause. Congress can regulate intrastate activities that affect interstate commerce, and the destruction of intrastate wetlands affects interstate commerce in two ways. First, fewer intrastate wetlands would lead to decreased populations of migratory birds, which would decrease the interstate revenue generated from activities involving those birds, such as hunting and photography. Second, intrastate wetlands are hydrologically connected to adjacent wetlands through the natural regeneration of the water cycle. Destroying intrastate wetlands would destroy their pollution-abating services and lead to increased pollution in interstate waters.

Congress may regulate classes of activities that affect interstate commerce, and no showing of individual effect is required of each member of the class. Thus, the wetland in the *Hoffman Homes* cases and other intrastate wetlands may be regulated by the EPA because the class of intrastate wetlands affects interstate commerce.

Robert D. Icsman

